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12 INCLUSION WEAR, LLC, and LITTLE

13 DOCUMENTARY FILMS, LLC.

11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13

14 ALISA WOLF, *et al.*

15 Plaintiffs,

16 v.

17 JOSEPH "JOEY" TRAVOLTA, *et al.*

18 Defendants.

CASE NO. 14-CV-00938-CAS (PJWx)

[Hon. Christina A. Snyder]

[Courtroom 5-2nd Floor]

Action Filed: February 6, 2014

4AC Filed: August 5, 2015

Trial Date: February 9, 2016

19 **DEFENDANTS' SUPPLEMENTAL**
20 **MEMORANDUM ON STATUTE OF**
21 **LIMITATIONS IN SUPPORT OF**
22 **MOTION FOR SUMMARY**
23 **JUDGMENT**

24 **DATE: N/A**

TIME: N/A

DEPT.: Court Room 5

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1 **I. Introduction.**

2 Plaintiffs' supplemental briefing on the application of the statute of
 3 limitations to bar their claims is almost entirely a rehash of existing arguments
 4 already rejected by the Court. Plaintiffs ignore their admission that they knew
 5 Defendants' program was "identical" to the one claimed by Wolf and "suspected
 6 Defendant Travolta had merely changed the cover sheet" for his submission to the
 7 Regional Center in 2006. Plaintiffs disingenuously argue that they avoided bringing
 8 claims in 2006 and 2007 based on a reasonable investigation, ignoring that they
 9 explicitly decided to "not pursue a lawsuit at this time, rather to write a different
 10 program to submit to the regional center," despite believing that "it seemed clear
 11 that Defendant Travolta was using the program."

12 Plaintiffs weakly argue that their delay in bringing suit is justified by efforts
 13 taken by Wolf to investigate, but these efforts stopped well short of even asking to
 14 see the competing "identical program" submitted by Travolta to the Regional
 15 Center. Notwithstanding the unreasonable investigation Plaintiffs claim to have
 16 performed, they still do not dispute that even after this investigation they still
 17 believed Travolta was causing them harm by taking their business opportunities and
 18 ideas in violation of fiduciary duties. As a result, Plaintiffs were on more than
 19 sufficient notice of the alleged harms suffered and thus their claims matured against
 20 Defendants in 2006 and 2007. Moreover, Plaintiffs ignore or talk past the lengthy
 21 explanation already provided by the Court in the prior tentative ruling that Plaintiffs'
 22 claimed reliance on Defendants' denials (which Defendants testify did not occur) is
 23 completely unreasonable and insufficient to overcome the statute of limitations.
 24 Despite Plaintiffs' lengthy and rambling rehash of the same arguments over the
 25 same evidence, all of Plaintiffs' claims are time barred.

26 Apart from the lengthy rehash of old arguments, Plaintiffs' only attempt to
 27 show that some non-time barred infringing activity occurred is a fleeting argument
 28 that "Defendants, either themselves or through the Frank D. Lanterman Regional

Center (FDLRC), were distributing copies of their infringing program design to other regional centers between 2011 and 2014.” Plaintiffs’ argument and *only new evidence* falls well short of showing that *Defendants* (and not third parties such as FDLRC) performed the asserted acts of distribution that allegedly violated Plaintiffs’ copyright in plagiarized material that she claims to own. Plaintiffs provide no evidence that FDLRC’s sending copies of program design documents to other nearby regional centers after the copyright claim cutoff date -- done for the recipient’s use in “courtesy vendoring” of the Vocational Film Making for that center’s students -- can be attributed to Defendants. Moreover, it is clear that FDLRC’s sporadic “distribution” of single copies of Defendants’ program service design (*e.g.* by fax) to other regional centers for the legally-mandated purpose of permitting nearby students to participate in an educational program would be a fair use.

Having demonstrated that the statute of limitations applies to Plaintiffs’ claims, and without any evidence negating Plaintiffs’ constructive knowledge of their claims or showing that any portion of the claims survive the statutory bar, Defendants are entitled to summary judgment on all of Plaintiffs’ claims.

II. New Facts at Issue.

In support of their supplemental briefing, the only additional evidence submitted by Plaintiffs is a declaration from counsel attaching three documents produced by third parties in response to subpoenas served during the litigation. Docket No. 184-1 (the “Chisvin Decl.”). Plaintiffs argue that this evidence shows that “Defendants, either themselves or through the Frank D. Lanterman Regional Center (FDLRC), were distributing copies of their infringing program design to the other regional centers between 2011 and 2014.” Dkt. No. 184 at 2:13-15.

Instead, the “distribution” referred to by Plaintiffs is the result of a process called “courtesy vendorization,” which occurs whenever one Regional Center’s client chooses to participate in a program that is geographically in another Regional

Center’s catchment area. Declaration of Joseph “Joey” Travolta in Support of Supplemental Memorandum on Statute of Limitations Motion for Summary Judgment (“Supp. Travolta Decl.”) ¶ 4. Because a Regional Center can only vendor programs in its own geographic or “catchment” area, “courtesy vendorization” is the mechanism that is used in such situations, as required by the State. *Id.* As part of the process and paperwork involved in “courtesy vendorization,” FDLRC may have sent copies of Defendants’ Program Service design to other Regional Centers. *See, e.g.* Chisvin Decl. at Ex. B (November 2011 fax from FDLRC of Defendants’ Program Service Design produced by South Central regional Center). However, Defendants had no control over any Regional Center’s decision to send copies of their Program Service Design to other Regional Centers as part of the legally mandated “courtesy vendoring” process. *Id.* at ¶ 3, 5, 6, 7, 8.

Notably, and despite arguing about the reasonableness of the investigation throughout their brief, Plaintiffs have not submitted **any** new evidence regarding Plaintiffs’ 2006 and 2007 “investigation” of their claims. Instead, Plaintiffs are still tied to the following undisputed facts:

- Plaintiffs were informed that FDLRC was working with Travolta on a “program identical” to the one submitted by Plaintiffs in 2006 (SGI 14);
- In 2006, Plaintiff Wolf “suspected that Defendant Travolta had merely changed the cover sheet” to the program service design submitted by Plaintiffs in seeking vendorization of his program (SGI 14);
- At a December 2006 AFA Board Meeting, after seeking and receiving legal advice on possible copyright infringement claims, Plaintiffs opted to forgo claims against Travolta for “taking the program” and instead it “was decided by the board of directors to not pursue a lawsuit at this time, rather to write a different program to submit to the regional center” over statements by Wolf that “it seemed clear that Defendant Travolta was using the program” (SGI 15);

- 1 • Despite this decision, Plaintiffs subsequently asserted directly to the
2 Regional Center that “All documents submitted” to the Regional Center
3 were “copywritten by me [Wolf] and registered with the U.S. State
4 Department,” that “Mr. Travolta broke his fiduciary duty when he
5 continued to have conversations with Lanterman Regional Center about
6 our program for his own personal gain,” that after Mr. Travolta left AFA
7 “any further conversations regarding this program should have ceased,”
8 asserting that by law “any and all concepts, programs and services which
9 are developed under a public charity belong to the charity” and that a
10 “board member may not take an idea, concept, program, or service for
11 personal gain.” (SGI 16);
- 12 • Plaintiffs met with regional center representatives in person and agreed to
13 withdraw their appeal and instead submit a different 2-year vocational
14 program that would include film, television, and animation vocational
15 training, in line with the prior decision of the AFA Board to forgo the
16 claims against Defendants (SGI 17);
- 17 • Following this meeting, Plaintiff Wolf still believed that Travolta was
18 harming Plaintiffs by taking their opportunities and ideas and breaching
19 fiduciary duties to them, despite claiming to have received reassurances
20 that the program service design was not copied (SUF 18).

21 In sum, Plaintiffs still cannot and do not factually dispute that in 2006 they
22 believed that Travolta had submitted the claimed copyrighted materials to the
23 Regional Center by just placing his name on them (*i.e.* making unauthorized copies
24 of the works), had directly asserted such claims to the Regional Center by January
25 2007, accused Travolta of copying the program design materials at issue in this case
26 in 2007 and asserting that his “breach of fiduciary duties” to Plaintiffs involved
27 improperly taking their “copywritten” for his own use and submission to the
28 Regional Center. Moreover, Plaintiffs admit that despite (disputed) claims they

1 were reassured by Travolta that he had not copied the materials, they continued to
 2 believe that Travolta was still causing harm to Plaintiffs by taking their
 3 opportunities and ideas and breaching fiduciary duties.

4 Plaintiffs provide no factual support to show that they were unable to conduct a
 5 reasonable investigation into their claims in 2006 and 2007. For example, Plaintiffs
 6 have not shown that they would not have been able to obtain a copy of the
 7 Defendants' program service design that Plaintiff Wolf "suspected" was the result of
 8 Travolta having "merely changed the cover sheet" to her claimed works.

9 **III. Plaintiffs Had Knowledge of Their Claims in 2006-2007 and Failed to**
 10 **Prove Their Exercise of Due Diligence.**

11 "The Ninth Circuit has held that a plaintiff may recover damages occurring
 12 outside the three-year window only if 'the copyright owner did not discover—and
 13 *reasonably could not have discovered*—the infringement before the commencement
 14 of the three-year limitation period,'" which results in "a 'disjunctive two-prong test
 15 of actual or constructive notice, under which the statute begins to run under either
 16 prong The plaintiff is deemed to have had constructive knowledge if it had
 17 enough information to warrant an investigation which, if reasonably diligent, would
 18 have led to discovery of the [claim.]'." *Fahmy v. Jay-Z*, 835 F. Supp. 2d 783, 790
 19 (C.D. Cal. 2011) (citing *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 706
 20 (9th Cir.2004); *Pincay v. Andrews*, 238 F.3d 1106, 1109–10 (9th Cir.2001))
 21 (emphasis in original).

22 Upon "suspicion that" their work "had been infringed," Plaintiffs had "a duty to
 23 investigate further into possible infringements of [the] copyrights," and whether or
 24 not they "conducted this further investigation, equity will impute to a litigant
 25 knowledge of facts that would have been revealed by reasonably required further
 26 investigation." *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d
 27 1515, 1521 (9th Cir. 1983) (affirming statute of limitation bar to infringement
 28

1 claims where prior suit over infringement of related photograph should have
 2 uncovered other infringements by same defendant).

3 After a Defendant shows Plaintiff had received “storm warnings” of potential
 4 infringement places a Plaintiff on notice of such claims, “the burden shifts to
 5 [Plaintiff] to show that [it] exercised reasonable due diligence and yet [was] unable
 6 to discover [its] injuries.” *William A. Graham Co. v. Haughey*, 568 F.3d 425, 438
 7 (3d Cir. 2009) (citations omitted).

8 Plaintiffs’ entire argument about constructive notice fails to acknowledge that
 9 Plaintiffs explicitly asserted they had infringement claims against Defendants in
 10 2006 and 2007. It is undisputed that Plaintiffs not only had reason to suspect, but
 11 explicitly documented their belief that they had such claims and even asserted to
 12 third parties that they had claims for infringement and other harms connected to
 13 Defendants’ allegedly wrongful vendorization with FDLRC in 2006 and 2007. (SGI
 14 14, 16.) Plaintiffs’ belief in claims of infringement in 2006 and 2007 were explicitly
 15 about Defendants’ submission of the allegedly infringing Program Service Design to
 16 FDLRC, and continued past the point where Defendants were first vendored based
 17 on that program service design submitted to FDLRC. At that point, Plaintiffs are
 18 charged with knowledge of their claims and with knowledge of the results of a
 19 reasonable investigation. Plaintiffs have provided no evidence or even argument to
 20 establish that they were unable to review Defendants’ allegedly infringing program
 21 service design at the time of Plaintiffs’ claimed “investigation,” either through
 22 informal or formal discovery.

23 In *Wood v. Santa Barbara Chamber of Commerce*, the plaintiff claimed that it
 24 had been prevented from completing discovery in a prior litigation over
 25 infringement of a related photograph, but the Ninth Circuit held “as a matter of law
 26 that [plaintiff] should reasonably have discovered the allegedly infringing use of
 27 those photographs currently at issue.” 705 F.2d at 1521. As was the case in *Wood*,
 28 Plaintiffs are charged with the results of a reasonable investigation, even if they

1 failed to properly investigate or use the available tools for discovery of their claims
2 at the time they received constructive notice and explicitly alleged their claims
3 against Defendants.

4 With knowledge of their potential claims, Plaintiffs failed to exercise a
5 reasonable amount of diligence to uncover the scope and extent of their claims.
6 Instead, it is undisputed that Plaintiffs made an explicit decision to not pursue claims
7 against Defendants and dropped their appeal to FDLRC in 2007. (SGI 15, 17.) In
8 addition, it is further undisputed that despite allegedly being assured that Defendants
9 were not using their program materials, Plaintiffs still believed they were being
10 wronged by Travolta's alleged taking of business opportunities and ideas and his
11 alleged breach of fiduciary duties in connection with the very same acts that
12 Plaintiffs allege start their claims - the vendorization with FDLRC. (SUF 18).
13 Plaintiffs knew they had claims against Defendants arising out of the same
14 transactions and events in which they assert that Travolta made infringing copies of
15 the works at issue in this case - the vendorization of the practical filmmaking
16 program using program service design materials alleged to infringe Wolf's
17 copyrights. Plaintiffs' failure to completely investigate and uncover the complete
18 scope of their known claims does not toll the statute of limitations.

19 **IV. Plaintiffs Have Not and Cannot Invoke Fraudulent Concealment.**

20 "The doctrine of fraudulent concealment is invoked only if the plaintiff both
21 pleads and proves that the defendant actively misled her, and that she had neither
22 actual nor constructive knowledge of the facts constituting his cause of action
23 despite her due diligence." *Grimmett v. Brown*, 75 F.3d 506, 514-15 (9th Cir.
24 1996). Simply put, when a plaintiff "had available all the facts necessary to
25 discover her cause of action with due diligence," there can be no claim for
26 fraudulent concealment to toll the limitations period. *Grimmett*, 75 F.3d at 515;
27 *Fahmy v. Jay-Z*, 835 F. Supp. 2d at 791.

1 Here, Plaintiffs already had knowledge of their claims against Defendants in
2 2006 arising out of Defendants' vendorization with FDLRC and actively asserted that
3 such claims existed to FDLRC. Defendants are therefore legally barred from
4 equitable tolling of the statute of limitations. Indeed, Plaintiffs do not dispute that
5 they were suspicious that Defendant Travolta had harmed them by infringing
6 copyright(s), taking ideas, breaching fiduciary duties, and improperly taking
7 business opportunities. As a result, Plaintiffs were required to "to take the steps a
8 reasonably diligent plaintiff would take in investigating its claims" that would be
9 based on their suspicion in 2006 and 2007. *Gabriel Techs. Corp. v. Qualcomm Inc.*,
10 857 F. Supp. 2d 997, 1006 (S.D. Cal. 2012).

11 Plaintiffs could have easily discovered the alleged infringement at the time of the
12 February 2007 meeting with Karen Ingram by simply asking to see a copy of the
13 program service design used by Travolta to vendorize with the Regional Center.
14 Instead, Plaintiff claims to have relied on (undocumented) representations from
15 potentially infringing parties that they had not used her work, including an alleged
16 representation by Ms. Ingram that does not appear in the letter confirming the
17 February 2007 meeting's events. As such, Plaintiffs failed to take the steps a
18 "reasonably diligent plaintiff would take in investigating its claims," and their
19 "failure either to proceed against [Defendants] based on the information known to it
20 or to undertake readily available means of confirming [the infringement] was so
21 unreasonable that summary judgment is appropriate." *Id.*

22 Additionally, where, as here, "testimony and corroborating documentary
23 evidence establishes that Plaintiffs actually considered its potential claims against"
24 Defendants, there can be no dispute that the statute of limitations began to run at that
25 time. *Gabriel Techs. Corp.*, 857 F. Supp. 2d at 1008. Plaintiffs do not dispute that
26 in 2006 they had received legal advice on potential claims based on the copying of
27 the program by Travolta, considered the advice, and decided not to pursue the
28 claims.

1 Plaintiffs' citations to *William A. Graham Co. v. Haughey* are unavailing in
2 preventing the obvious conclusion that Plaintiffs were suspicious of the alleged
3 infringement and wrongdoing in 2006 and 2007, and should have reasonably
4 uncovered the alleged infringement by undertaking a reasonable investigation.
5 Unlike *Haughey*, "the storm warnings arose after the alleged wrongs" had already
6 occurred; Plaintiffs became suspicious and were informed of the "identical
7 program" after Travolta had already submitted documents for vendorization, and
8 Plaintiff's meeting with the Regional Center in February 2007 occurred after
9 Defendants were fully vendored in January of the same year. SGD 15-17; *c.f.* 568
10 F.3d 425, 439 (3d Cir. 2009) (no "duty to inquire into future wrongdoing," but
11 potential plaintiff could be charged with knowledge when "inquiry notice arose for
12 past wrongs.") Furthermore, Plaintiffs did not just have "evidence that a person is a
13 bad actor in some general sense," but instead had specific suspicions that
14 "Defendant Travolta had merely changed the cover sheet" to the program service
15 design submitted by Plaintiffs, i.e. that Defendants were making unauthorized
16 derivative works from the claimed work(s). SGD 14; *c.f. Haughey*, 568 F.3d at 440.

17 Furthermore, a claim of fraudulent concealment requires more than a "failure to
18 'own up'," to wrongdoing to show "active concealment." *Grimmett*, 75 F.3d at 515;
19 see also *Fahmy v. Jay-Z*, 835 F. Supp. 2d at 791 (statement by defendants' attorney
20 asserting license were not grounds for equitable tolling). Nor can a party rely on
21 actions taken by persons other than Defendants to invoke fraudulent concealment.
22 *Fahmy v. Jay-Z*, 835 F. Supp. 2d at 791-92 (misleading statements by plaintiff's
23 agent was not ground for equitable tolling). As a result, Plaintiffs' misplaced
24 reliance on alleged statements that no infringement was occurring from Defendants
25 or third party FDLRC would not be sufficient to show active concealment by
26 Defendants sufficient to invoke equitable tolling, even if Plaintiffs were not on
27 notice of their claims in 2006.

1 As a result, there is no issue of material fact that prevents the complete
2 application of the statute of limitations to all of Plaintiffs' claims.

3 **V. Plaintiffs Have Failed to Show Infringing Activity by Defendants after**
4 **the Statutory Bar.**

5 “[A defendant] is only liable for *his* acts of infringement committed within three
6 years prior to [a plaintiff's] lawsuit.” (emphasis in original). *Fahmy v. Jay-Z*, 835
7 F. Supp. 2d 783, 788 (C.D. Cal. 2011) (citing *Makedwde Publ'g Co. v. Johnson*, 37
8 F.3d 180, 181 (5th Cir.1994)).

9 In its tentative ruling on the statute of limitations, the Court noted “that neither
10 party has referenced any testimony or other evidence in the record regarding alleged
11 copyright infringement occurring between 2011 and 2014,” and for that reason, the
12 Court made a *sua sponte* motion “to grant summary judgment in favor of defendants
13 as to the entirety of plaintiffs’ two copyright claims.” Dkt. No. 183 at 17-18. The
14 Court did invite the parties to “file supplemental briefing regarding this issue.” *Id.*
15 at 18.

16 In response to the Court’s invitation, Plaintiffs’ brief makes scant reference to
17 allegedly infringing activity “occurring between 2011 and 2014.” Indeed, the only
18 activity in the statutory period referenced at all is five lines of text arguing that
19 “Attached to the Declaration of Craig Chisvin (“Chisvin Decl.”) accompanying this
20 brief are copies of documents produced in discovery by regional centers that show
21 Defendants, either themselves or through the Frank D. Lanterman Regional Center
22 (FDLRC), were distributing copies of their infringing program design to the other
23 regional centers between 2011 and 2014.” Dkt. 184 at 2:11-15.

24 Thus, the only infringing activity even claimed by Plaintiffs to overcome the
25 Court’s *sua sponte* motion for summary judgment as to the entirety of the copyright
26 claims is the alleged distribution of copies of the “infringing program design to the
27 other regional centers.” However, Plaintiffs’ documentary evidence and argument
28

1 fall well short of showing that Defendants committed or were even able to control
2 the allegedly infringing distribution.

3 As set forth in the Supplemental Declaration of Defendant Travolta,
4 Defendants neither instructed nor controlled any third party Regional Centers to
5 have them “distribute” copies of the Inclusion Film Program Service Designs for the
6 Practical Film Workshop to any other Regional Centers. Supp. Travolta Decl. ¶ 3.
7 Instead, the copies were “distributed” by the third party Regional Centers to other
8 Regional Centers in connection with a process called “courtesy vendorization.” *Id.*
9 Defendants had no control over any Regional Center’s decision to send copies of the
10 program service design. *Id.*

11 Instead, Regional Centers are required to use “courtesy vendorization”
12 whenever a client chooses to participate in a program which geographically is in
13 another Regional Center’s catchment area. *Id.* at ¶ 4. A client by law and regulation
14 can only be a client of the Regional Center in the catchment area of the client’s
15 residence. *Id.* The Regional Center can only vendor programs in its own catchment
16 area. If the client wants to participate in a program that happens to be in another
17 Regional Center’s catchment area, “courtesy vendorization” is the mechanism that is
18 used as required by the State. *Id.* This practice is certainly more prevalent in urban
19 areas such as the Los Angeles basin where there are seven regional centers in a
20 relatively small geographic, but largely populated, area. *Id.*

21 For example, Plaintiffs attach a copy of the Inclusion Films Practical Film
22 Workshop program service design labeled “TWO PHASE PRACTICAL FILM
23 PROGRAM” with a date of February 4, 2008, which bears a facsimile transmission
24 stamp evidencing a “distribution” by FDLRC to the South Central Regional Center
25 on November 16, 2011. Chisvin Decl. ¶ 4, Ex. C. Defendants did not instruct or
26 control FDLRC’s “distribution” of the allegedly infringing document. Travolta
27 Decl. ¶ 5. Plaintiffs also attach a copy of the program service design dated “April
28

22, 2010”¹ and copies of the Inclusion Films website published by Defendants in or about April 2010. Chisvin Decl. ¶ 5, Ex. D; Supp. Travolta Decl. ¶ 5-6. Defendants did not control the distribution of documents to Westside Regional Center, instead it appears that Plaintiffs sent these documents as part of their subpoena. Supp. Travolta Decl. ¶5, 6; Chisvin Decl. ¶ 5. Plaintiffs also attached a document created by third party Futures Explored Inc. bearing a date of July 28, 2014. Chisvin Decl. ¶ 3, Ex. B; Travolta Decl. ¶ 7. As is apparent from the document and confirmed by Mr. Travolta, Defendants did not create the document and did not control its distribution to the Alta Regional Center. Travolta Decl. ¶ 7.

Moreover, the alleged “distribution” of copies of Defendants’ program service designs by third party Regional Centers to other third party Regional Centers as part of the legally mandated “courtesy vendoring” process is certainly a non-infringing fair use. *See, e.g. Newport-Mesa Unified Sch. Dist. v. State of California Dep’t of Educ.*, 371 F. Supp. 2d 1170, 1176 (C.D. Cal. 2005) (legally mandated individual copying of copyrighted “test protocols to parents of special education students” was a fair use in the public interest).

Finally, and in the face of the prior evidence on summary judgment showing Plaintiffs’ rampant plagiarism and copying of her claimed work from third parties², Plaintiffs completely failed to show or explain which portions of documents allegedly distributed by third parties after the statutory bar contain content that Plaintiff actually owns. Without any delineation, Plaintiffs’ claims for infringement based on such later distribution based on a generalized assertion of copying Wolf’s efforts appears to violate the Copyright Act’s prohibition on using copyright to claim ideas and systems (*e.g.* for creating a program service design describing a

¹ This 2010 document is a minor revision of prior program service designs that makes no changes to any of the wording that Plaintiff Alisa Wolf claims to own in this case. Supp. Travolta Decl. ¶ 5.

² *E.g.* Dkt. No 144-1, SGI 34-38, demonstrating wholesale copying of the claimed work from third party sources.

1 method for the provision of a vocational program in filmmaking to disabled young
2 adults). *See* 17 U.S.C. § 102(b) (“In no case does copyright protection for an
3 original work of authorship extend to any idea, procedure, process, system, method
4 of operation, concept, principle, or discovery, regardless of the form in which it is
5 described, explained, illustrated, or embodied in such work.”); *see also Gaines v.*
6 *D.C.*, 961 F. Supp. 2d 218 (D.D.C. 2013) (Purported “business plan” in illustrated
7 instructional manual for using advertising images on a lottery ticket was an idea,
8 and, as such, was not protected under the Copyright Act); *Kaminski v. BP Expl. &*
9 *Prod. Inc.*, 975 F. Supp. 2d 1220 (M.D. Fla. 2013) (Engineer's ideas for responding
10 to a massive underwater oil spill were not protected under federal copyright law).

11 **VI. Conclusion.**

12 Plaintiffs have failed to raise a dispute of material facts sufficient to prevent
13 summary judgment. They cannot deny their suspicions and expressed belief in their
14 claims of copyright infringement, breaches of fiduciary duty, and taking of ideas in
15 2006 and 2007 that more than put them on notice. Instead, Plaintiffs chose not to
16 pursue claims at that time and failed to perform diligent investigation that would
17 have allowed them to obtain a copy of Travolta’s program service design and
18 evaluate whether it was actually different from Wolf’s claimed work. Nor can
19 Plaintiffs claim estoppel based on the claim that Defendants and FDLRC made bare
20 denials of copying, especially in light of their contemporary knowledge of claims
21 and continued belief in harm by Plaintiffs.

22 Plaintiffs have also failed to present any evidence showing acts of
23 infringement **by Defendants** within the statutory period. Instead, the only new
24 evidence or argument provided by Plaintiffs relies on an allegation of “distribution”
25 which amounts to third party Regional Centers having sent copies of Defendants
26 program service design to other Regional Centers in connection with the legally-
27 mandated “courtesy vendorization” process. This fair use by third parties does not
28 amount to infringement by Defendants within the statutory period.

1 For the foregoing reasons, the Court should grant summary judgment in
2 Defendants' favor on all of Plaintiffs' claims, including the entirety of Plaintiffs'
3 two copyright claims. Upon such entry of judgment, Defendants further request a
4 briefing schedule for their motion to recover attorneys' fees and costs pursuant to 17
5 U.S.C. section 505.

6 Dated: February 22, 2016

Respectfully submitted,

7 **RAINES FELDMAN LLP**

8
9 By: /s/Steven T. Gebelin

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